

No. 10-0001

IN THE SPECIAL COURT OF REVIEW

Inquiry Concerning a Judge, No. 96

THE HONORABLE SHARON KELLER'S MOTION TO DISMISS
AND BRIEF IN SUPPORT

HEARING REQUESTED

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September 9, 2010

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TO THE HONORABLE SPECIAL COURT OF REVIEW:

The Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals (the “CCA”), files this Motion seeking dismissal of all charges asserted against her in the Charging Document filed by the State Commission on Judicial Conduct (the “Commission” or “SCJC”), as well as dismissal of the SCJC’s July 16, 2010, Order and public warning (the “Order,” included at Appendix A).

I. INTRODUCTION

Even when conducted flawlessly, judicial disciplinary proceedings skirt the edges of due process:¹ the SCJC acts as police, grand jury, prosecutor, judge, and jury, because it investigates alleged misconduct, brings charges, prosecutes cases, rules on motions, and determines punishments; allegations against judges are made anonymously; discovery is limited; judges may be punished without a hearing; judges have no right to

¹ Article 5, Section 1-a(11) of the Texas Constitution provides that judges in disciplinary proceedings must be accorded due process “in the same manner that any person whose property rights are in jeopardy in an adjudicatory proceeding is entitled to due process of law[.]” As one court observed:

[J]udges are afforded the full benefit of the procedural due process protections of the Fourteenth Amendment, which, ‘though a variable and elusive concept, in its basic essence means a fair process.’ Cohn, The Limited Due Process Rights of Judges In Disciplinary Proceedings, 63 *Judicature* 232, 235 (1979). These protections include the right to discovery and the privilege against self-incrimination, Cohn, *Id.* at 238-40, and are derived from the liberty and property interests judges are recognized to have in their offices. Shamen, et al., *Judicial Conduct and Ethics*, §13.09 at 448. Fundamental fairness, therefore, is a concept that pervades the judicial disciplinary process.

In re Cicchetti, 697 A.2d 297, 307 (Pa. Ct. Jud. Disc.1997).

confront their accusers; judges have no right to a jury trial and limited appellate rights; and the SCJC's deliberations and votes are secret.

In this case, however, the SCJC's prosecution of Judge Keller has been far from flawless; it has gone terribly astray and trampled upon Judge Keller's due process and other rights under the U.S. Constitution and the Constitution and laws of Texas. Unwilling to accept Judge Keller's victory at trial before Judge David Berchermann in August 2009, the SCJC ignored his findings, made up new findings lacking any evidentiary support, and imposed on Judge Keller a punishment so far outside its authority that the SCJC's Executive Director and Examiner publicly admitted that "the order . . . does not comport with the Texas Constitution."² The SCJC has run amok, and Judge Keller looks to this Court to enforce the Constitution by dismissing all of the SCJC's charges. If this Court does not enforce the Constitution's strictures, the judicial disciplinary process will have devolved into vindictive lawlessness, where due process is not a right, but a slogan.

As will be shown below, the SCJC's Order and the public warning it contains (both of which are incorporated into the Charging Document), are unconstitutional and were entered by an illegally constituted Commission. Because the SCJC did not issue a legal punishment against Judge Keller, its only option was to dismiss all charges against her; hence, this Motion seeks dismissal of the SCJC's Order and public warning, and the dismissal of all charges against Judge Keller.

² M. A. Robbins, *Bad Law? Judicial Conduct Commission Examiner Questions Basis for Public Warning in Keller Case*, Texas Lawyer, July 26, 2010. App. B.

In addition, the supposed “rule” which the SCJC charges Judge Keller with violating is not a rule at all; it was merely an oral tradition of the CCA, and cannot be the basis for any sort of charge or punishment against Judge Keller. Also, because the Commission does not allege that Mr. Richard asked to be heard by the CCA, Judge Keller cannot be disciplined for violating his right to be heard. Because the charges against Judge Keller are void on their face and unsupported by essential factual allegations, Judge Keller seeks dismissal of the SCJC’s charges on these additional, independent grounds, as well.

II. BACKGROUND AND SUMMARY OF MOTION

Through its Charging Document, filed September 2, 2010, the SCJC avers that this Court is to conduct a trial de novo; but, of course, the choice of what type of proceeding is to be held is a matter for this Court, not the Commission, to decide.³ Whatever this Court’s decision on this issue, however, one thing that is absolutely clear is that, as a matter of law, the Order is unconstitutional and should be vacated. In addition, because the SCJC was unwilling to issue, and the evidence did not support, a punishment passing constitutional muster, and its only alternative was to dismiss the charges against Judge Keller, this Court should dismiss the charges against Judge Keller. To proceed with a trial de novo would reward the SCJC for its blatantly illegal conduct – conduct the Commission has publicly admitted was unconstitutional – and tempt it to gin up illegal sanctions in future cases simply so it could, as in this case, repeatedly change its theory of

³ For reasons explained below, it is unclear whether this Court sits as an appellate court pursuant to Texas Government Code Section 33.034(e)(1), or as a trial court of a de novo proceeding pursuant to Section 33.034(e)(2).

an empty case. The SCJC cannot use its own misconduct as a vehicle to prosecute Judge Keller yet again.

A. Procedural History

This case concerns allegations of judicial misconduct made by the SCJC against Judge Keller. The events giving rise to the SCJC's initiation of this case concern a condemned inmate's lawyers' failure to file any pleading requesting a stay of execution with the CCA on September 25, 2007. Following the events of that day, the SCJC conducted a year-long confidential investigation. On February 19, 2009, the SCJC filed its Notice of Formal Proceedings against Judge Keller in Inquiry Concerning a Judge, No. 96. App. C. The Commission's Examiner, Seana Willing (who is also the Commission's Executive Director) requested the appointment of a Special Master, and on April 9, 2009, the Texas Supreme Court appointed Judge David Berchermann, Jr. Special Master. App. D. On June 15, 2009, the Examiner, without the knowledge or approval of the SCJC, filed her First Amended Notice of Formal Proceedings. App. E.

From August 17 through 20, 2009, Judge Berchermann conducted a trial to determine whether, as charged by the Commission, Judge Keller denied Michael Wayne Richard access to the CCA on the day of his execution for capital murder. Following the 2009 trial, Judge Berchermann entered Findings of Fact that exonerated Judge Keller of all of the Commission's charges and absolved her of the stain of its allegations, specifically finding that Judge Keller "did not violate any written or unwritten rules or laws," and that her conduct "does not warrant removal from office, or even further reprimand beyond the public humiliation she has surely suffered." App. F at 16.

The SCJC's Examiner objected to Judge Berchermann's Findings, which were then heard by the SCJC on June 18, 2010. The SCJC did not allow any evidence to be presented at its hearing. At that point, the Texas Constitution gave the SCJC three options: dismiss the charges, as recommended by Judge Berchermann; censure Judge Keller; or recommend her removal from the bench. The relevant provision of the Texas Constitution states as follows:

After such investigation as it deems necessary, the Commission may in its discretion issue a private or public admonition, warning, reprimand, or requirement that the person obtain additional training or education, *or* if the Commission determines that the situation merits such action, *it may institute formal proceedings and order a formal hearing to be held before it concerning the censure, removal, or retirement of a person holding an office . . .* or it may in its discretion request the Supreme Court to appoint an active or retired District Judge . . . as a Master to hear and take evidence in any such matter, and to report thereon to the Commission. . . . If, *after formal hearing, or after considering the record and report of a Master*, the Commission finds good cause therefor, it shall issue an order of *public censure or it shall recommend to a review tribunal the removal or retirement*, as the case may be of the person in question . . .

Tex. Const., Art. 5, § 1-a(8) (App. G, emphasis added).

Inexplicably, the SCJC chose none of these options proscribed by the Constitution; instead, it completely ignored Judge Berchermann's findings and imposed a public warning against Judge Keller:

Pursuant to the Authority contained in Article 5, sec. 1-a(8) of the Texas Constitution, it is ordered that Judge Keller's conduct described above be made the subject of a **PUBLIC WARNING** by the State Commission on Judicial Conduct.

Order, App. A, at 19. Because the SCJC requested, and the Supreme Court appointed, Judge Berchermann to serve as Special Master and hold a trial and issue findings, the

SCJC had but three constitutional remedies from which to choose. But the SCJC did not “issue an order of public censure or . . . recommend to a review tribunal the removal or retirement” of Judge Keller, because a public warning is not a censure. A public warning is a sanction:

“Sanction” means an order issued by the commission under Section 1-a(8), Article V, Texas Constitution, providing for a private or public admonition, warning, or reprimand or requiring that a person obtain additional training or education.

Tex. Gov’t Code § 33.001(10) (App. H). A censure is a different punishment from a sanction such as a public warning:

“Censure” means an order of denunciation issued by the commission under Section 1-a(8), Article V, Texas Constitution, or an order issued by a review tribunal under Section 1-a(9), Article V, Texas Constitution.

Tex. Gov’t Code § 33.001(1) (App. H); *see also In re Jenevein*, 158 S.W.3d 116, 118 (Tex. Spec. Ct. Rev. 2003) (“Article V, Sections 1-a(8) and 1-a(9) of the Texas Constitution refer to censure only within the context of formal proceedings, while sanctions are contemplated under Section 1-a(8) in the context of informal proceedings.”).

To summarize events to this point: The SCJC instituted an informal investigation, but did not discipline Judge Keller at its close. Instead, the Commission initiated formal proceedings. A four-day trial was held before Judge Berchermann, who concluded, based on his Findings of Fact, that Judge Keller should not be disciplined. Then the SCJC held a hearing, and was unable to garner the constitutionally required seven votes required for a constitutional punishment, so instead of dismissing the charges, as required by the Constitution, it issued its unconstitutional public warning, apparently on the basis of just

six votes, *see* Order, App. A, at 17, a remedy which is not one of the three permitted choices afforded the SCJC under the Constitution.

After unsuccessfully attempting to have the Order voided by the Supreme Court via mandamus,⁴ Judge Keller filed her request for a Special Court of Review on August 16, 2010, App. I, and asked the Chief Justice to specify whether this matter would be considered as an appeal or a trial de novo. On August 18, Chief Justice Jefferson appointed this Court, but did not state whether this matter will be heard as an appeal or as a trial de novo. App. J. On September 2, the SCJC filed its Charging Document, which avers that the it seeks a trial de novo. But things are not as simple as the SCJC states.

B. The Commission Seeks to Benefit From its Illegal Conduct

The illegal Order created a quandary for this Court and poses a further threat to Judge Keller. There is no question that an SCJC order disciplining a judge may be appealed pursuant to Section 33.034 of the Government Code; the question is the form of that review. The problem presented here arises from the fact that appellate review – that is, review based on the record of formal proceedings held before the Special Master and the SCJC – is for orders following formal proceedings, like censure, *see* Tex. Gov’t Code § 33.034(e)(1), and, as noted above, a public warning is not a censure. On the other hand, the Government Code provides for a trial de novo under Section 33.034(e)(2) for those sanctions which may only be imposed *before* formal proceedings are instituted and

⁴ Judge Keller attempted to raise the issues presented by this Motion before the Supreme Court by mandamus. The SCJC opposed that Petition, arguing, among other things, that review by this Court provided an adequate legal remedy. The Supreme Court denied Judge Keller’s Petition in a one-sentence ruling without an opinion.

when there has been no trial. *See* Tex. Gov't Code § 33.034(e)(2).⁵ The illegal Order falls into neither of those categories: it was entered following the initiation of formal proceedings and a trial, and includes a sanction which may only be imposed before the filing of formal proceedings.

A trial de novo would violate Judge Keller's due process rights and is fundamentally unfair. This case was tried before Judge Berchermann, and Judge Keller prevailed. It was heard a second time, before the SCJC, and because the Commission issued a facially unconstitutional Order, Judge Keller prevailed again. Now the SCJC wants to try this case a *third* time. It is reasonable to ask: *how many times does Judge Keller have to defend herself against the SCJC's charges?* – charges which *change with each charging document*, demonstrating that the Commission knows Judge Keller didn't do anything wrong, but is intent on manufacturing a theory under which it can justify its crusade against her. Allowing a trial de novo would bless the SCJC's illegal conduct and reward it with a third prosecution of Judge Keller when it failed to punish her in any manner authorized by the Texas Constitution; it also would wrongfully benefit the SCJC by nullifying the trial held before Judge Berchermann and making waste of his carefully rendered Findings of Fact. A more egregious example of unclean hands is hard to conjure. *See In re Jim Walter Homes, Inc.*, 207 S.W.3d 888, 899 (Tex. App. – Houston

⁵ Section 33.034(e)(2) refers to review by this Court of a "sanction." Rule 1(e) of the Procedural Rules for the Removal and Retirement of Judges defines a "sanction" as "any . . . warning . . . issued publicly or privately, by the Commission," and also states that "[a] sanction is remedial in nature" and "is issued prior to the institution of formal proceedings[.]"

[14th Dist.] 2006, orig. proceeding) (the doctrine of unclean hands applies to “one whose conduct in connection with the same matter or transaction has been unconscientious, unjust, or marked by a want of good faith, or one who has violated the principles of equity and righteous dealing”) (quoting *Thomas v. McNair*, 882 S.W.2d 870, 880-81 (Tex. App. – Corpus Christi 1994, no writ.)).

This Court should flatly rebuff the Commission’s invitation to collude in further unconstitutional mischief, and dismiss all charges against Judge Keller. Because this formal proceeding has already been tried before the Special Master and heard by the Commission, and the Commission has not entered a legal punishment against Judge Keller, the Constitution requires dismissal of all charges.

C. Overview of the Motion

Judge Keller asks that this Court vacate the Order and dismiss all charges against her because: (i) as the Examiner and Executive Director of the Commission has publicly admitted, the Order does not comport with the Texas Constitution; (ii) the Commission relied on and cited a rule that states the SCJC may act with as few as six votes when the Constitution mandates seven votes; (iii) the Order did not include a finding of good cause that Judge Keller should be either removed from office or censured, whereas the Constitution demands such a finding before it may act against a judge, (iv) the law or rule Judge Keller is accused of violating is not a law or rule at all (it was simply an oral tradition of the CCA that cannot be the basis for a punishment of any sort); (v) because Mr. Richard never asked to be heard by the CCA, Judge Keller cannot have denied his right to be heard as charged by the Commission; (vi) the Commission allowed three of its

members to deliberate regarding the Order even though they were disqualified from serving by the Texas Constitution; and (vii) because the Commission was unable to issue a constitutional punishment, and because there is no constitutional or statutory basis for remand or retrial of this case by the Commission, dismissal of the charges is required.

III. ARGUMENT AND AUTHORITIES

A. The Order is Unconstitutional and Must be Vacated

Under Texas law, a court may vacate a void order – an order which the issuer “had no power to enter.” *State v. Ferguson*, 125 S.W.2d 272, 274 (Tex. 1939). “A judgment which discloses its invalidity on its face anywhere at any time is a nullity and may be disregarded anywhere at any time.” *Fulton v. Finch*, 346 S.W.2d 823, 827 (Tex. 1961).

If the court is exercising special statutory powers the measure of its authority is the statute itself, and a judgment in excess thereof is null and void and subject to collateral attack[.]

Cline v. Niblo, 117 Tex. 474, 8 S.W.2d 633, 638 (1928) (emphasis in original). This Court may vacate the Order and declare it void. As the Texas Supreme Court stated:

While it is wholly unnecessary to appeal from a void judgment, it is nevertheless settled that an appeal may be taken and the appellate court in such proceeding may declare the judgment void.

Fulton v. Finch, 346 S.W.2d at 827; *see In re Southwestern Bell Tel. Co.*, 35 S.W.3d 602, 605 (Tex. 2000) (because the trial court acted in a case “long after its plenary power had expired . . . its order was void”).

In this case, the Order is void on its face because it was rendered contrary to limiting constitutional authority; the SCJC had no more jurisdiction to render a public warning against Judge Keller than it would to order her home to be forfeited. As already

mentioned, the SCJC had three, and only three, choices under the Constitution, ignored them all, and acted lawlessly, punishing Judge Keller simply because it could.

The SCJC based its public warning on Rule 10(m) of the Procedural Rules for the Removal or Retirement of Judges. Order, App. A, at 17. That rule does purport to allow the SCJC to issue a public warning after it initiates formal proceedings, App. K, but the Rule must give way to the Constitution;⁶ the Constitution defines and limits the punishments the SCJC has the authority to impose. As already shown, after the SCJC initiates formal proceedings against a judge, the Constitution grants it authority to issue only three remedies: dismissal of charges, public censure, or a recommendation for removal or retirement:

If, after formal hearing, or after considering the record and report of a Master, the Commission finds good cause therefor, it shall issue an order of public censure or it shall recommend to a review tribunal the removal or retirement, as the case may be of the person in question . . .

Tex. Const., Art. 5, § 1-a(8) (App. G, emphasis added).

The Texas Constitution is clear, even if the SCJC chose to be blind to its plain terms. Once the SCJC initiated formal proceedings against Judge Keller on February 19, 2009, it had authority to dismiss the charges against her; it had authority to censure her;

⁶ Rule 10(m) also conflicts with the Texas Government Code (App. H), which defines “formal proceedings” as “the proceedings ordered by the commission concerning the public censure, removal, or retirement of a judge.” § 33.001(7). Ultimately, of course, it is the Constitution’s requirements which control. *See State v. Shoppers World, Inc.*, 380 S.W.2d 107 (Tex. 1964); *Duncan v. Gabler*, 147 Tex. 229, 215 S.W.2d 155 (1948).

and it had authority to recommend her removal or retirement; but the SCJC did *not* have authority to issue a public warning against her.⁷

A fundamental principle of due process is notice and a right to be heard. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652 (1950). Here, Judge Keller received no notice that the Commission would consider a public warning as possible punishment, and therefore was not able to address the constitutional infirmity of such a punishment at the June 2010 hearing. Furthermore, if the Court rewards the Commission with a new trial, Judge Keller will be forced to try a different case than was tried before Judge Berchermann, because the Examiner has changed her theory of the case (for the second time) and brought different charges against her, thereby penalizing Judge Keller for appealing to this Special Court of Review. *Cf. Blackledge v. Perry*, 417 U.S. 21, 30-31, 94 S.Ct. 2098 (1974) (holding that the potential for prosecutorial vindictiveness against those who seek to exercise their right to appeal raised sufficiently serious due process concerns to require a rule forbidding the State to bring increased charges against defendants who exercise that right). Even more disturbing is the fact that, after trying this entirely new case, the Government Code states that Judge Keller has no right to appeal. *See* Tex. Gov't Code § 33.034(i) ("The court's decision under this section is not appealable."). This is a far cry from due process "in the same manner that any person whose property rights are in jeopardy in an adjudicatory proceeding is entitled to due process of law[.]" Tex. Const. Art. 5, § 1-a(11).

⁷ As already explained, under Texas law, a public warning is not a censure; they are different forms of punishment under both the Constitution and the Government Code.

There are additional, independent reasons the Order is unconstitutional. The SCJC explicitly stated that it could act “by affirmative vote of six of its members[.]” Order, App. A, at 17 (quoting Rule 10(m) (App. K)). The Constitution, however, requires the affirmative vote of *seven* members to recommend removal or retirement, or for public censure. Tex. Const., Article 5, sec. 1-a(5) (App. G). For all other acts of the Commission, the Constitution requires a “majority vote of those present,” *id.*, which in this case also would be seven members, as twelve Commissioners heard the case. (The Honorable Steven L. Seider did not participate in the SCJC proceeding. App. L.)

In addition, the Constitution requires a finding of “good cause” by the SCJC as a prerequisite to the punishment that it allows following the initiation of formal proceedings. Here, the Order is devoid of an explicit finding of good cause for any admonition. Moreover, no such finding may be inferred. The language of the Constitution is mandatory: if “the Commission finds good cause therefor, it *shall* issue an order of public censure . . .” Tex. Const., Art. 5, § 1-a(8) (App. G, emphasis added). Because no order of public censure was issued, it must be presumed that the Commission did not find good cause to censure Judge Keller. Such a presumption comports not only with the law, but with common sense: if the Commission had found good cause to issue a public censure, it would have done so. Not only did the SCJC not make a finding of good cause, it wholly ignored Judge Berchermann’s Findings of Fact, which even the

SCJC's Special Counsel admitted were due deference.⁸ The SCJC, which heard no additional evidence, gave the Special Master no deference at all, referring to his Findings of Fact as mere "observations." Order, App. A, at 2.

The SCJC did not stop at ignoring Judge Berchermann's findings; it actually made up findings which lacked any evidentiary support. For example, the SCJC found that CCA General Counsel "Marty did not then know that the TCCA's Execution-day Procedures required that all communications regarding the scheduled execution must be first referred to the assigned judge." Order, App. A, at 8 (Finding 43). In fact, the undisputed evidence was that Marty was the *author* of those procedures. E. Marty Test., App. N (Tr. at vol. 4, 107:12-16). The SCJC presumably made this finding to support the charge that Judge Keller failed to properly train and supervise Mr. Marty. This charge was not one of the charges the SCJC brought against Judge Keller; it was added by Examiner Willing four months after the formal proceedings were instituted, without, as she testified, the knowledge or approval of the SCJC. App. O. It is now part of the new Charging Document.

⁸ At the June 18 hearing, its Special Counsel stated the following about the standard of review and the degree of deference the SCJC should apply to the Special Master's Findings of Fact:

I believe that you do not have a de novo review on this type of Section 10 formal proceeding. I believe that your review would be guided by substantial evidence principles.

. . . .

If I were in your shoes and saw a conflict that supported the finding, though there was contrary evidence, I would give deference to the finding.

J. McKetta statement, Transcript of Hearing, App. M, at 44:4-7, 71:8-11.

Some of the SCJC's made-up facts have also made their way into the new Charging Document. In its findings Nos. 95 and 96, the SCJC found that "Judge Keller's addressing and disposing of the September 25, 2007, communications" denied Richard's "right to a hearing as required by law under [Texas Rule of Appellate Procedure] 9.2(a)." The Charging Document adopts these preposterous findings. *See* Charging Document ¶¶ 61, 62. But Rule 9.2 has nothing to do with a party's "right to a hearing;" it concerns only the *filing of documents*, and states that "[a] document is filed with an appellate court by delivering it to . . . a justice or judge of that court who is willing to accept delivery." Findings Nos. 95 and 96 (and the new charges) not only have no record support, they are incomprehensible. Likewise, the SCJC found that Judge Keller "interfered with Richard's and his counsel's opportunity to be heard by the judge assigned to Richard's execution." Order, App. A, at 16 (Finding 117). This "fact" also has been incorporated into the Charging Document. *See* Charging Document, at 11-12. But in its own Responses to Judge Keller's Requests for Admissions, the SCJC admitted that "a stay of execution could have been filed with any CCA judge on September 25, 2007 after 5 p.m." App. P, at 5. And the CCA Judge assigned to Mr. Richard's execution, Judge Johnson, testified that Judge Keller did not block access to her. App. Q (Tr. at vol. 2, 128:10-19).

Because the Commission did not find good cause to issue a constitutional punishment, the inescapable conclusion is that the Order must be declared void and the charges dismissed – because dismissal is the only action that could constitutionally have been taken without a finding of good cause for imposition of one of the three penalties

available to the SCJC. The SCJC's illegal conduct in issuing a public warning, rather than dismissing all charges, should not be rewarded with a new trial – particularly a new trial based on false charges. The Constitution should be enforced, and all charges against Judge Keller should be dismissed.

B. The Oral Execution-day Procedures Were Not a Law, Canon, or Rule Imposing a Sanctionable Duty on Judge Keller.

As the SCJC admits in its Charging Document, the CCA's execution-day procedures were an unwritten "oral protocol" as of September 25, 2007. The SCJC does not contend that this "oral protocol" was a law, canon of conduct, or court rule. The SCJC alleges that the oral protocol was a "duty of Judge Keller's office," but offers no citation to support the allegation – because no legal authority exists to support the allegation. Fortunately for the citizens of Texas, the Commission does not promulgate laws or create "duties of office" that are binding on elected officials like Judge Keller. The actual rules and laws governing Judge Keller and the CCA are codified in article 5 of the Texas Constitution, chapter 22 of the Texas Government Code, and the Texas Rules of Appellate Procedure – none of which, it should go without saying, mention the "oral protocol" at the heart of the SCJC's latest allegations against Judge Keller. She might as well be accused of violating the "Don't Mess With Texas" motto (although at least that is written). The "oral protocol" simply was not a duty of office.

As pleaded by the SCJC, the "oral protocol" provided that "[a]ll communications regarding the scheduled execution shall first be referred to the assigned judge." Notwithstanding the fact that Judge Keller did not receive any communication of any sort

from Mr. Richard’s representative, and is not accused by the SCJC of receiving any such communication; notwithstanding the SCJC’s admission that it was Judge Johnson, not Judge Keller, who was “in charge” of Mr. Richard’s execution (App. A at 1, 3), and therefore was responsible for the CCA and its staff complying with the “oral protocol;” and notwithstanding the fact that the SCJC does not allege that Judge Keller ever said that the CCA would not accept a filing from Mr. Richard’s attorneys; the SCJC would have this Court discipline Judge Keller for simply answering a question from the CCA’s General Counsel about whether the clerk’s office could be kept open late – a request Judge Keller denied because the procedure for after-hours filings is spelled out in Texas Rule of Appellate Procedure 9.2, and does not require the clerk’s office to be open for a pleading to be filed.⁹ As Judge Berchermann found, “there simply is no evidence that by saying ‘no’ twice” to the request to keep the clerk’s office open late, “Judge Keller was indicating to [General Counsel] Marty that the entire court should close at 5:00; *nor did she have the power to close the court or access to all judges.*” App. F, at 9 (emphasis added).

As Judge Berchermann also found, the CCA’s “oral tradition was not a court or statutory rule” upon which any discipline can be premised. App. F, at 8. Although

⁹ Rule 9.2(a)(2) of the Texas Rules of Appellate Procedure states:

- (a) A document is filed in an appellate court by delivering it to:
 - (1) the clerk of the court in which the document is to be filed; or
 - (2) a justice or judge of that court who is willing to accept delivery. A justice or judge who accepts delivery must note on the document the date and time of delivery, which will be considered the time of filing, and must promptly send it to the clerk.

Canon 2A of the Texas Code of Judicial Conduct provides that “[a] judge shall comply with the law,” the Commission does not accuse Judge Keller of violating Canon 2A. Furthermore, Texas case law instructs that “‘comply with the law’ . . . mean[s] both that the judge should *apply* the law from the bench and *abide* by the law in all of his or her other activities.” R. Schuwerk & L. Hardwick, 48A HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 26:4, at 94 (West 2009). Here, Judge Keller was not *applying* any sort of law on September 25, 2007 – that is, she was not rendering any sort of legal decision when she stated that the clerk’s office would close at 5:00 p.m. Rather, Judge Keller was merely reciting a fact and acknowledging a procedure that is codified in an actual law: the clerk’s office closes at 5:00 p.m. every day. *See* Tex. Gov’t Code § 658.005(a). This is not an “application of the law” under Canon 2A. Nor is Judge Keller accused of violating any law.

Judge Keller cannot be disciplined for allegedly violating an unwritten procedure. *Cf. Haney v. State*, 544 S.W.2d 384, 387-88 (Tex. Crim. App. 1976) (person cannot be prosecuted based on a violation of an unwritten law). The worst that can be said of Judge Keller’s conduct is that she declined to exercise her authority to order the clerk’s office to remain open as long as Mr. Richard’s attorneys wanted – but that is not a failure to comply with a law. In this regard, the case of *Ford v. State* is instructive. *Ford* was an appeal of a murder conviction in which the defense argued that the trial judge committed reversible error by refusing to perform a jury shuffle, which is a statutory right. *See* Tex. Code Crim. P. art. 35.11. The State conceded that the judge erred, but argued that the

error would better be addressed through a disciplinary proceeding. The Court of Appeals rejected that argument:

In those instances where the conduct of a judge in failing to follow a mandatory procedure is either “willful or persistent,” the State suggests the matter could be dealt with through disciplinary sanctions by the State Commission on Judicial Conduct. **We do not believe disciplinary sanctions in situations such as this would be either warranted or effective.**

Ford v. State, 977 S.W.2d 824, 828 (Tex. App. – Fort Worth 1998) (emphasis added; citation omitted), *rev’d on other grounds*, 73 S.W.3d 923 (Tex. Crim. App. 2002). Indeed, in *Ford*, the CCA determined that the violation of the statutory right to a jury shuffle was harmless error. *See Ford*, 73 S.W.3d at 925. If failing to follow a mandatory, written, statutory procedure is neither sanctionable by the SCJC nor harmful, punishment plainly cannot be imposed where the “law” in question is merely an unwritten tradition of court practice.

C. Judge Keller Did Not Interfere With Mr. Richard’s Right to a Hearing

There is another reason the charges all must be dismissed. Every one of the charges leveled against Judge Keller complains that she interfered with Mr. Richard’s “right to be heard.” But nowhere in the Charging Document does the SCJC allege that Mr. Richard tried to be heard. What is lacking from the Commission’s Charging Document is any allegation that there was an actual attempt on September 25, 2007, to file anything with the CCA. As already noted, in Texas, a document is deemed filed with the CCA by delivering the document to either the clerk of the court or a judge of the court. *See Tex. R. App. P. 9.2(a)*. The Commission posits neither that Mr. Richard’s

attorneys attempted to deliver an appeal or stay motion to the clerk or a judge, or that any attorney attempted to contact a judge of the court to accept delivery.¹⁰

Judge Keller cannot be disciplined for denying a hearing to a man whose lawyers did not ask for one. The charges against her should therefore be dismissed.

D. The SCJC Was Unconstitutionally Composed

Three Commissioners were disqualified from serving on the SCJC. Commissioner Michael Fields was disqualified because his term had expired. He and Commissioner Tom Cunningham were disqualified because they live in the same appellate court district; and Commissioner Jan Patterson was disqualified because she lives in the same appellate court district as Commissioners Karry Matson and Patti Johnson. The participation of three unqualified Commissioners renders the Order void.

The relevant facts are these: Commissioner Fields is a judge of the County Criminal Court in Harris County. His term expired on November 19, 2009. App. R at 1, 4. Commissioner Cunningham is a Houston attorney. *Id.* at 6, 9. Commissioner Patterson is a Member of the Austin Court of Appeals. *Id.* at 10, 14. Commissioner

¹⁰ In fact, the Commission knows full well that Judge Keller's decision to not keep the clerk's office open late had no effect on Mr. Richard's legal team, because they continued working on his behalf for an hour after Judge Keller declined their request. The Commission also knows that none of Mr. Richard's lawyers ever called, or attempted to call, the CCA on his behalf. The Commission also knows that the clerk's office had never been kept open past 5:00, even on execution days – and even when executions were conducted at midnight. The Commission also knows that the decision to not file anything with the CCA was made solely by a member of Mr. Richard's legal team, who admitted under oath that no one else instructed her not to file something with the CCA. That these significant facts are omitted from the SCJC's latest Charging Document underscores the illegitimacy of the SCJC's campaign against Judge Keller.

Matson resides in Georgetown, which is in Williamson County. *Id.* at 16, 19. Commissioner Johnson resides in Canyon Lake, which is in Comal County. *Id.* at 21, 24.

The Texas Supreme Court's rule concerning disqualified judges is clear: "any orders or judgments rendered by a judge who is constitutionally disqualified are void and without effect." *In re Union Pacific Resources Co.*, 969 S.W.2d 427, 428 (Tex. 1998).

Commissioner Fields was disqualified because the face of his Appointment Order shows that his term expired on November 19, 2009, seven months before the SCJC's hearing concerning Judge Keller. App. R at 1. He was disqualified from serving under Article 5, Section 1-a(3) of the Constitution (App. G), which provides that "[t]he regular term of office of Commissioners shall be six (6) years[.]".

In addition, Commissioners Fields, Cunningham, and Patterson, were disqualified under the Constitution's mandatory residency restrictions for Commissioners. The Texas Constitution provides that "a Commissioner of class (i), (ii), (iii), (vii), or (viii) may not reside or hold a judgeship in the same court of appeals as another member of the Commission." Tex. Const. Art. 5, § 1-a(2) (App. G).

In this case, Commissioner Patterson is a class (i) Commissioner, as she is a Member of the Austin Court of Appeals (in the Third Court of Appeals District), App. R at 10, 14 at; Commissioner Cunningham is a class (iii) Commissioner, as he is a Houston (Harris County) attorney (in the First and Fourteenth Courts of Appeals Districts), *id.* at 6, 9; and Commissioner Fields is a class (vii) Commissioner, as he is a County Court of Law Judge in Harris County (in the First and Fourteenth Districts). *Id.* at 1, 4. Commissioner Karry Matson resides in Georgetown, which is in Williamson County, *id.*

at 16, 19, and Commissioner Patti Johnson resides in Canyon Lake, which is in Comal County. *Id.* at 21, 24. Williamson County and Comal County are both in the Third Court of Appeals District. Tex. Gov't Code § 22.201.

Commissioner Fields resides and holds office in the same court of appeals districts (First and Fourteenth) as Commissioner Cunningham, and therefore they could not serve together on the SCJC. Commissioner Patterson resides and holds office in the same court of appeals district (Third) as Commissioners Matson and Johnson, and therefore is disqualified from serving. Accordingly, Commissioners Patterson, Cunningham and Fields were disqualified under the Constitution from sitting on the case.

The Commission which rendered the Order was unconstitutionally composed. All three of the disqualified Commissioners participated in the June 18 hearing, *see* App. S at 2, even after Judge Keller informed the Commission of their constitutional disabilities. App. T. The Order is void, because the SCJC violated the Constitution by allowing three disqualified members to participate in the proceedings which resulted in the Order.

The Order does not disclose how the disqualified Commissioners voted, or what the vote was. All we know is that the SCJC stated that it could act “by affirmative vote of six of its members[.]” Order, App. A, at 17 (quoting Rule 10(m)). Given the disqualification of three Commissioners, the Order could have been rendered by as few as *three* qualified Commissioners – out of a total of 13! The fact that we do not know who

voted for the public warning is the SCJC's doing; it decided to deliberate secretly and to keep secret its members' votes.¹¹

The SCJC denied Judge Keller her right to be judged only by qualified Commissioners. This Court cannot divine what influence the disqualified Commissioners had on their colleagues. In light of the illegality of the Order, there is no basis for this Court to presume that the participation of three disqualified members in issuing the Order resulted in anything other than a void Order.

IV. CONCLUSION

The Order violates the Constitution and is void. The Order was entered by an illegally constituted Commission which issued a public warning it was barred by the Constitution from entering. Because the Commission's only constitutional option, absent a finding of good cause for disciplining Judge Keller, was to dismiss all charges against her, this Court should do the Commission's constitutional duty, as it has proved incapable of complying with the law. To allow these proceedings to continue would reward the Commission for violating the Constitution and abusing Judge Keller's rights. Furthermore, the Commission's Charging Document shows on its face that no discipline against Judge Keller is appropriate: she is not accused of violating any law, rule, or

¹¹ Given the secrecy of the SCJC's deliberations and its refusal to disclose the identities of the Commissioners voting for the Order, the SCJC's deliberations and Order are more analogous to a jury deliberation and verdict than to a court ruling. It is presumptively harmful when objectionable jurors are improperly allowed to participate in the rendering of a verdict: the harm is caused not by the verdict, but by the corruption of the process. *See Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 91 (Tex. 2005).

canon of conduct; and because the Commission does not allege that Mr. Richard asked to be heard by the CCA, Judge Keller could not have denied him a hearing.

For the reasons set forth herein, The Honorable Sharon Keller, Presiding Judge of the Texas Court of Criminal Appeals, respectfully asks the Court to vacate the July 16, 2010, Order of the State Commission on Judicial Conduct, direct the Commission to expunge that Order from its records, and render judgment that all charges against The Honorable Sharon Keller be dismissed.

Judge Keller respectfully requests that a hearing of this Motion be set for the earliest possible date.

Respectfully submitted,

/s/ Charles L. Babcock

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**ATTORNEYS FOR APPELLANT THE
HONORABLE SHARON KELLER**

CERTIFICATE OF SERVICE

On September 9, 2010, the original and one copy of the foregoing Motion, with accompanying Appendix, are being filed with Blake Hawthorn the Clerk of the Special Court of Review by hand delivery with electronic copies to Blake A. Hawthorne and Claudia Jenks. The following have also been served with copies of the forgoing Motion and accompanying Appendix:

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